Filed 6/21/19 P. v. Phillips CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DONALD PHILLIPS, Defendant and Appellant.	A154355 (Napa County Super. Ct. No. CR6195)

Appellant Donald Phillips appeals from the trial court's order extending his civil commitment at Napa State Hospital to April 1, 2020, pursuant to Penal Code section 1026.5,[1] which sets forth the procedure for commitment extensions for people who have been found not guilty by reason of insanity (NGI). Appellant contends the trial court violated his constitutional right to equal protection by instructing the jury that he had the burden of proving that medication or treatment renders him no longer dangerous, considering that similarly situated mentally disordered offenders (MDOs) do not have that burden of proof. We agree with the People that appellant has forfeited this claim by failing to assert it in the trial court.

PROCEDURAL BACKGROUND

On December 4, 2017, the Napa County District Attorney filed a petition under section 1026.5 to extend appellant's civil commitment at Napa State Hospital for two additional years beyond the April 1, 2018 expiration date of his then current commitment.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

On May 10, 2018, a jury found true the allegation in the petition that appellant "suffers from mental disease, defect and disorder and that because of this mental disease, defect and disorder he poses a substantial danger of physical harm to others and has serious difficulty controlling his behavior." The court therefore granted the petition and ordered appellant's commitment extended for two years, until April 1, 2020.

On May 14, 2018, appellant filed a notice of appeal.

FACTUAL BACKGROUND

The following evidence was presented at appellant's commitment extension trial, which took place on May 7, 8, and 9, 2018.[2]

Dr. Cristian Mateescu, a staff psychiatrist at Napa State Hospital, testified as an expert in the diagnosis of risk assessment and mental illness. He was appellant's treating psychiatrist for approximately a year and a half, from July 2016 until January 2018. Mateescu testified that appellant suffers from schizoaffective disorder, bipolar type, which combines two types of symptoms, including paranoia, delusions, hearing voices, together with manic and depressive episodes. Having symptoms from two diseases makes appellant's disease more severe than others because of the need to treat differing symptoms. Mateescu had observed symptoms of paranoia in appellant once or twice a month during the time he was appellant's treating psychiatrist.

---

[2] Before any testimony was offered, the court read the following stipulations to the jury regarding appellant's prior criminal history:

"Number one is, 'In 1968 Don Phillips was convicted of assault with a deadly weapon, a lesser-included offense within the time [*sic*] assault with a deadly weapon with intent to commit murder. He was sentenced to prison.' . . .

"The second stipulation. 'In 1975, while on parole Don Phillips was convicted of second degree murder and sentenced to prison.'

"Third stipulation. 'In 1980 while on parole Don Phillips was convicted of robbery and sentenced to prison.'

"And the last stipulation. 'In 1986 Don Phillips was found to be not guilty by reason of insanity for attempted murder. He was committed to the State Department of Mental Hygiene.' "

Mateescu further testified, however, that other than during the intake interview when he first started treating appellant, when appellant "exhibited some signs of psychosis . . . , he has been doing pretty well in the hospital. Without any incidents for a long period of time and he didn't exhibit any acute psychosis." When Mateescu had met with appellant the previous week, he observed that "the symptoms have been diminished considerably. It surprised me that he appears very lucid, clear when I met with him last Friday. He had a very minor form of paranoia about some incident that happened last October over wheeling and dealing with some peers. . . . But besides that, to be honest it appears that he was pretty clear and he had a very good insight into mental illness. He admitted that he has that disease and also surprised me that for the first time he told me that he needs to be on medication, he believed that he needs to be on medication for the rest of his life." Mateescu believed appellant was genuine in expressing a desire to be on medication, because it made him feel better.

Appellant was being treated with two medications, Abilify, an antipsychotic, and Depakote, a mood stabilizer. The Abilify was about 75 percent effective, with only residual symptoms, and the Depakote was 100 percent effective. These medications were working very well for appellant in the structured environment of the hospital, although it was uncertain how well they would work if he were out in the community. It is important that appellant consistently take his medications for the rest of his life. If appellant stopped taking his medication, his symptoms, such as intense paranoia and auditory hallucinations, would likely return within six months.

Mateescu opined that appellant currently posed a substantial danger of physical harm to others if released into the community and that he had serious difficulty controlling his behavior. This opinion was based on appellant's interactions with his peers and the "minimal symptoms" and impulsivity he still exhibited, which "may prevent him from having the skills to refrain [*sic*] himself from hurting somebody. . . . And even though [he] tries his best to prevent those from happening, but those are inherent to his condition, mental illness." Although appellant's condition had improved in the hospital, Mateescu believed his commitment should be extended because he still

had some symptoms even with his medication and he needed to attend more groups to learn coping skills.

Dr. Richard Welker, appellant's current psychologist, testified as an expert in the diagnosis of mental illness and risk assessment of the mentally ill. Welker had been appellant's treating psychologist for about five months, since December 2017. Welker agreed with Mateescu's diagnosis of appellant: schizoaffective disorder, bipolar type. Appellant was in the "residual phase" of his illness. Appellant's primary treatment was psychotropic medication, along with adjunctive treatment and therapy. Welker believed that appellant's medications were working reasonably well and were controlling most of his symptoms, although he had shown some symptoms of persecutory and grandiose thinking, and was quick to become very irritable. He also often talked very rapidly and went off on tangents.

Welker believed that appellant had "partial insight" into his mental illness in that he could state his diagnosis and his most prominent symptoms. When Welker asked appellant if he would take his medications if he were to be released from the hospital, appellant said, "It would be stupid not to." Appellant also had made comments that he felt the medications helped with his mental health. If appellant stopped taking his medications or took them inconsistently, Welker believed he would become highly symptomatic very quickly.

Welker also described appellant's prior outpatient release to CONREP, from May 1992 to January 1993, stating that appellant "became ill" and "did a very appropriate thing, he left a note [about] what was going on and they brought him back into the hospital." Even though his conduct was "positive," it was considered a treatment failure because he was out in the community and his treatment failed. Welker was also concerned that appellant would be vulnerable to stresses if he were released, after spending most of his life in an institution with a very structured living situation. In the hospital setting, Welker believed appellant's risk for violence was low. However, in a less structured community setting, where he would be exposed to stressors and have the freedom to go off his medications, his risk for violence would be high.

Welker opined that appellant posed a substantial danger of physical harm to others because of his mental illness and that he currently had serious difficulty controlling his behavior.

Suzanne Dunne, a forensic clinician with the CONREP conditional release program, testified as an expert in the assessment of the mentally ill for safety and for outpatient treatment. Dunne provided mental health services and supervision for NGIs and MDOs who have been discharged from a state hospital. She met with appellant on March 13, 2018, to determine his eligibility for community outpatient treatment. She also reviewed his legal and clinical file.

During her meeting with appellant, who was 71 years old, he initially said "that he didn't have a mental illness, that he was fine now." With encouragement from his social worker, he was able to say that he had "paranoid schizophrenia bipolar." He knew "a couple of his symptoms," but had a "[v]ery rudimentary and minimal understanding" of his mental illness "with very little insight."

Dunne spoke with appellant about his medications. He was able to identify two of his three medications by name, Depakote and Abilify, but he "wasn't able to say why he took them or what they did for him."[3] Dunne spoke with appellant about his triggers and warning signs for decompensation, and "he didn't know them at all." When she asked him about CONREP, "he said he was kind of interested but no, he really wanted to get off scot-free." In Dunne's opinion, appellant was not ready to be treated as an outpatient.

Appellant testified on his own behalf. He was currently taking Abilify and Depakote. He had no side effects with the Abilify, but had minor muscle stiffness with the Depakote. The Depakote helped him with being "moody," which to him meant manic or depressive. He described the Abilify as "deal[ing] with my psychosis because I have a—as I say, an anger problem. I have paranoia. . . . But my anger and—I have grandiosity," like thinking "I'm president of the United States" or "I'm the richest person

[3] As noted, the psychiatric testimony reflected that appellant took two medications related to his mental health: Abilify and Depakote.

in the world," or "I'm gonna become Einstein overnight." The Abilify helped him with those kinds of beliefs; it also helped with the hallucinations and delusions he used to have. If appellant were out of the hospital and his doctors told him to keep taking the medication he was on now, he would do so because it was the only thing that helped with his anger. He would "surely" keep taking his medications if released from the hospital.

Appellant wanted to "get on CONREP" when he left the hospital because he needed the support. Appellant testified about his CONREP release in 1992, when he reported that he was experiencing symptoms again. He knew that this might cause him to be returned to the hospital, but stated, "I didn't want to hurt nobody and I wanted help, I needed help." If he began experiencing symptoms again after his release, he "would get hold of the police or walk into a clinic . . . , call my CONREP, anything, just make somebody aware that I need help immediately." He would tell "whoever it was necessary to tell" because he did not want to hurt anyone anymore.

DISCUSSION

Appellant contends the trial court violated his constitutional right to equal protection by instructing the jury that he had the burden of proving that medication or treatment renders him no longer dangerous, given that that similarly situated MDOs do not have that burden of proof.[4]

I. *Statutory Framework*

Under section 1026.5, subdivision (a)(1), a person committed to a state hospital after being found not guilty of an offense by reason of insanity pursuant to section 1026 "may not be kept in actual custody longer than the maximum term of commitment." (§ 1026.5, subd. (a)(1).) However, under section 1026.5, subdivision (b)(1), a person

[4] Here, the trial court instructed the jury in relevant part as follows: "Control of a mental condition through medication is a defense to a petition to extend commitment. To establish this defense Mr. Phillips must prove by a preponderance of the evidence he no longer poses a substantial danger of physical harm to others because he is now taking medicine that controls his mental condition and he will continue to take that medicine in an unsupervised environment." (See CALCRIM No. 3453.)

may be committed beyond the term prescribed by subdivision (a) if he or she "has been committed under Section 1026 for a felony and," after a trial, the trier of fact finds that he or she "by reason of mental disease, defect, or disorder represents a substantial danger of physical harm to others." (§ 1026.5, subd. (b)(1) & (b)(3).) Under this procedure, the person is entitled to a jury trial at which he is represented by counsel, to discovery under criminal rules, to appointment of psychologists or psychiatrists, and to "the rights guaranteed under the federal and State Constitutions for criminal proceedings." (§ 1026.5, subd. (b)(2)-(7).) In making a finding of substantial danger of physical harm under subdivision (b)(3) of section 1026.5, there must also be proof that the person has " 'at the very least, serious difficulty controlling his potentially dangerous behavior.' [Citations.]" (*People v. Sudar* (2007) 158 Cal.App.4th 655, 662, *citing In re Howard N.* (2005) 35 Cal.4th 117, 127.) If the jury finds that the person does represent a substantial danger of physical harm to others, the person may be recommitted "for an additional period of two years from the date of termination of the previous commitment." (§ 1026.5, subd. (b)(8).) Further extensions can be sought at two-year intervals thereafter.

II. *Equal Protection*

In NGI extension proceedings, the People bear the burden of proof beyond a reasonable doubt with respect to dangerousness, but "the effect of medication in controlling the [defendant's] dangerousness and whether he will self-medicate in an unsupervised environment may be raised by the [defendant] as a defense." (*People v. Bolden* (1990) 217 Cal.App.3d 1591, 1600.) Specifically, our Supreme Court in *Bolden* held that this so-called medication defense is an affirmative defense, and the trial court may therefore constitutionally place on the defendant the burden of proving the defense by a preponderance of the evidence. (*Id.* at p. 1602.) In contrast, when the People seek to extend the commitment of an MDO, *they* must "prove, beyond a reasonable doubt, that, if released, the defendant will not take his or her prescribed medication and in an unmedicated state, the defendant represents a substantial danger of physical harm to others." (*People v. Noble* (2002) 100 Cal.App.4th 184, 190.)

Appellant contends NGIs and MDOs have been treated as similarly situated for other purposes and should be found similarly situated with respect to the burden of proof on the issue of medication. He also contends the state has no compelling reason that would justify treating NGIs differently. The People assert that appellant forfeited his equal protection challenge to the instruction given in this case by failing to raise it in the trial court. Appellant responds that the issue here is one of law that does not require resolution of disputed factual issues and may, therefore, be raised for the first time on appeal.

Both parties rely on *People v. Dunley* (2016) 247 Cal.App.4th 1438, 1447 (*Dunley*), in which the court exercised its discretion to decide an equal protection challenge that had not been preserved by an appropriate objection in the trial court. We agree with the People that appellant has forfeited his equal protection challenge. That this court has discretion to consider an issue that was not raised below does not mean we must do so. In addition, *Dunley* is of no aid to appellant. There, the appellate court excused the defendant's failure to raise the equal protection issue in the trial court because, at the time of the commitment extension trial, published authority authorized what defendant claimed was prohibited and "it would not have been unreasonable to assume that an objection would have been futile" based on that authority. (*Dunley*, at p. 1447; accord, *People v. Curlee* (2015) 237 Cal.App.4th 709, 715.)

Here, by contrast, appellant relies for his equal protection argument on cases that were decided well before the May 2018 trial of the extension petition, including *People v. McKee* (2010) 47 Cal.4th 1172, *Dunley*, *supra*, 247 Cal.App.4th 1438, *People v. Curlee*, *supra*, 237 Cal.App.4th 709, *People v. Alfasar* (2017) 8 Cal.App.5th 880, and *People v. Noble*, *supra*, 100 Cal.App.4th 184. He has not shown futility or any other excuse for the failure to raise the issue below.

We therefore decline to reach the equal protection issue. We do so with the awareness that the Legislature has adopted separate statutory schemes for NGIs and MDOs, and that while there are similarities between them, there are also differences, not the least of which is that, unlike an MDO, an NGI has proved by a preponderance of the

evidence that he was insane at the time of the crime and has been acquitted on that basis but subjected to commitment based on his mental condition. (See *People v. Bolden*, *supra* 217 Cal.App.3d at p. 1599 ["By definition, the only persons coming within section 1026.5's framework are felons who have previously proven their own insanity"].) The question appellant asks us to decide is whether the equal protection clause requires that MDOs and NGIs be treated alike for purposes of who shoulders the burden of proving the efficacy of medication on dangerousness and the likelihood the individual will self-medicate. This in turn depends on whether they are similarly situated with respect to release from commitment and the procedures governing release, the appropriate level of constitutional scrutiny to be applied, and the nature and importance of the interests the state may have in treating them differently for this purpose. The first and second of these are essentially legal issues. But in *People v. McKee, supra*, 47 Cal.4th 1172, our high court recognized that the third—that is, the justification for the differential treatment of sexually violent predators and MDOs—may entail a factual showing. (*Id*. at p. 1208 [remanding to give People opportunity to show that sexually violent predators presented a greater risk to society and, therefore, that imposing on them a greater burden before they can be released from commitment is needed to protect society].) The court in *McKee* declined to allow the People to rely on legislative findings alone, requiring evidence to support the reasons for the differential treatment. (*Id*. at pp. 1206–1207; accord, *People v. Curlee*, *supra*, 237 Cal.App.4th at p. 722 ["proper remedy is to remand the matter to the trial court to conduct an evidentiary hearing to allow the People to make an appropriate showing" that "testimony of an NGI is less necessary than that of an SVP"]; see also *People v. McKee* (2012) 207 Cal.App.4th 1325, 1331 [finding that evidence proffered on remand to trial court provided substantial evidence supporting differential treatment of sexually violent predators].)

Here, appellant's failure to raise the equal protection issue in the trial court deprived the People of the opportunity to make any such factual showing. This, too, counsels against exercising our discretion to decide the issue.

DISPOSITION

The order is affirmed.

_____
Kline, P.J.

We concur:

_____
Richman, J.

_____
Stewart, J.

People v. Phillips (A154355)